Lloyds Bank plc v Ang Cheng Ho Quarry & Ors

HIGH COURT (KUCHING) — SUIT NO KG 487 OF 1987
CHONG SIEW FAI J
30 DECEMBER 1992

Civil Procedure *— Costs — Review of award on 'getting-up' fee — Discretion of taxing officer — Court's power to review — Principles applicable — Rules of the High Court 1980 O 59 r 36(4)*

The plaintiff sued four defendants including the first defendant company and the third defendant for RM2,107,968.58 being amount owing under credit facilities granted to the first defendant guaranteed by the other defendants including the third defendant who also agreed to indemnify the plaintiff. The first and third defendant filed a defence denying liability. On 12 April 1988, the plaintiff took out an application for judgment against the first, second and third defendants which was subsequently withdrawn because the first defendant had settled the plaintiff's claim but the question of costs were left open with liberty to apply. On 9 July 1990, the court ordered the first defendant to pay the second and third defendants costs occasioned by the plaintiff's application for judgment which was subsequently withdrawn. The matter in dispute relates to art 152 (getting-up fee) of the third defendant's bill of costs. At the initial taxation, the registrar allowed RM10,000 for this item. Upon review at the instance of the third defendant, the registrar increased it by RM18,000 to RM28,000 and the first defendant applied to the court for a review by the judge.

Held, reducing the amount from RM28,000 to RM18,000:

(1) The third defendant was clearly entitled to claim the getting-up fees for works that were necessarily and properly done though the action had not been set down for trial, having regard to the wide scope of item 26 of App 1 to O 59 of the Rules of the High Court 1980. The item was therefore rightly allowed.

(2) An advocate should not be precluded from preparing his client's case in greater depth to enhance chances of success in the application, as well as for the action, particularly since pleadings, as in this case, had closed. The third defendant had to be involved in the action up to the stage as had been attained because of the first defendant's delay in effecting settlement.

(3) Generally speaking, the discretion of the taxing officer on quantum will not be interfered with. However, having regard to the circumstances of this case, there was justification in making a reduction from the amount to RM28,000 allowed for this item. No interest was awarded on the amount.

[Bahasa Malaysia summary

Plaintif telah mendakwa empat orang defendan termasuk syarikat defendan pertama dan defendan ketiga untuk RM2,107,968.58 iaitu

jumlah yang terhutang di bawah kemudahan kredit yang telah diberi kepada defendan pertama yang dijamin oleh defendan yang lain termasuk defendan ketiga yang juga telah bersetuju untuk menanggung rugi pihak plaintif. Defendan pertama dan ketiga telah memfailkan pembelaan menafikan liabiliti. Pada 12 April 1988, plaintif telah memohon untuk penghakiman terhadap defendan pertama, kedua dan ketiga yang kemudiannya telah ditarik balik kerana defendan pertama telah menyelesaikan tuntutan plaintif tetapi soalan kos telah dibiarkan terbuka dengan kebebasan untuk memohon.

Pada 9 Julai 1990, mahkamah telah mengarahkan supaya defendan pertama membayar defendan kedua dan ketiga kos yang dibelanjakan oleh plaintif apabila memohon untuk penghakiman yang kemudiannya telah ditarik balik. Perkara yang dipertikaikan berkaitan dengan perkara 152 (fee penyediaan guaman) bil kos defendan ketiga. Pada penetapan kos awal, pendaftar telah membenarkan RM10,000 untuk perkara ini. Dalam kajian semula atas permintaan defendan ketiga, pendaftar telah menaikkannya sebanyak RM18,000 kepada RM28,000 dan defendan pertama telah memohon kepada mahkamah untuk kajian semula oleh mahkamah.

Diputuskan, mengurangkan jumlah itu dari RM28,000 kepada RM18,000:

(1) Defendan ketiga dengan jelasnya berhak menuntut fee penyediaan guaman itu untuk kerja yang telah semestinya dan dengan betul dibuat walaupun tindakan itu belum ditetapkan untuk perbicaraan, memandangkan skop butiran 26 Lampiran 1 kepada A 59 Kaedah-Kaedah Mahkamah Tinggi 1980. Butiran itu telah dibenarkan dengan betul.

(2) Seseorang peguambela tidak patut dihalang daripada menyediakan kos kliennya dengan mendalam supaya menambahkan peluang untuk berjaya di dalam permohonan itu, dan juga untuk tindakan itu, lebih-lebih lagi memandangkan pliding, seperti di dalam kes ini, telah ditutup. Defendan ketiga terpaksa melibatkan diri dalam tindakan ini sehingga tahap sepertimana yang dicapai kerana kelewatan defendan pertama dalam menyelesaikan kes ini.]

Cases referred to

1 *Starlite Ceramic Industry Ltd v Hiap Huat Pottery* [1973] 1 MLJ 146 (refd)
2 *Jackson v Parker and Gurney Champion* (unreported) (refd)
3 *Thorne v Thorne* [1979] 1 WLR 659 (refd)
4 *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25 (refd)
5 *Simpson Motor Sales (London) Ltd v Hendon Corp* [1964] 3 All ER 833 (distd)
6 *Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors* [1989] 1 MLJ 426 (refd)

Legislation referred to

Rules of the High Court 1980 O 59 App 1 items 26, 27

YS Yap (Ee & Lim Advocates) for the first defendant/applicant.
ML Lau (Sim & Yee Advocates) for the third defendant/respondent.

Chong Siew Fai J: This is an application by the first defendant company for review of art 152 of the third defendant's bill of costs taxed by the learned registrar of the High Court. Particulars given under art 152 of the bill are as follows:

> Taking instruction to defend, considering law and facts, attending on and corresponding with client, arranging to obtain reports or advice from M/s Drew & Napier Advocates and Solicitors, Singapore on Singapore law, making search at Company Registry, perusing pleadings, affidavits, general law and conduct of proceedings.

The item in App 1 to O 59 of the Rules of the High Court 1980 relied on is item 26 which provides: 'Instructions for trial or hearing of any cause or matter whatever the mode of trial or hearing. Discretionary.'

The 'Note to items 26 and 27' in App 1 states:

> These items are intended to cover the doing of any work, not otherwise provided for, necessarily or purposely done in preparing for a trial, hearing or appeal, or before a settlement of the matters in dispute, including —
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> (a) taking instructions to sue, defend, counterclaim, or appeal, or for any pleading, particulars of pleading, affidavit, preliminary act or claim in a reference under Order 70, rule 39;
> (b) considering the facts and law;
> (c) attending on and corresponding with client;
> (d) interviewing and corresponding with witnesses and potential witnesses and taking proofs of their evidence;
> ...
> (h) perusing pleadings, affidavits and other relevant documents;
> ...
> (j) the general care and conduct of the proceedings.

The claim has sometimes been called 'getting-up fee'.

The relevant facts forming the background of the present review may be stated as follows:

The plaintiff sued four defendants including the first defendant company and the third defendant for RM2,107,968.58 being amount owing under credit facilities granted to the first defendant guaranteed by the other defendants including the third defendant who also agreed to indemnify the plaintiff.

The first defendant filed a defence denying liability.

The third defendant also filed a defence which was subsequently amended, denying liability and raising, inter alia, matters on exchange control, illegality, consent of Bank Negara Malaysia, money-lending, alleged variation of letter of offer by the plaintiff, rate of interest and so forth.

On 12 April 1988, the plaintiff took out an application under O 14 and O 18 r 19 of the Rules of High Court 1980 for judgment against the first, second and third defendants. Various affidavits and documents as exhibits were filed on behalf of the plaintiff and various defendants. Eventually, the application and the action were withdrawn with leave of court because the

first defendant had settled the plaintiff's claim, but the question of costs were left open with liberty to apply. A

On 16 March 1990, the third defendant through his advocates, applied by notice of motion for his costs of the action and of the application for judgment to be paid by the plaintiff. On 9 July 1990, the learned judge ordered the first defendant to pay the second and third defendants costs of the action including costs occasioned by the plaintiff's application for judgment which was subsequently withdrawn for reason aforesaid. (A Sanderson Order as it is normally called.) B

The third defendant therefore took out the notice of taxation of his bill of costs in respect of which art 152 is now on review.

Originally, the sum claimed under art 152 was RM55,000. At the initial taxation, the learned registrar allowed RM10,000. Upon review at the instance of the third defendant on 11 September 1991, she increased it by RM18,000 to RM28,000. (For reasons, see encl 121 encl A). C

The first defendant, now applies for review by a judge.

For the first defendant, it was contended that the item should be disallowed altogether. Having regard to the wide scope of item 26 and the note relating thereto as reproduced above, I reject the contention. Moreover, there are ample authorities allowing getting-up fees for works that were necessarily and properly done though the actions had not been set down for trial. See for example *Starlite Ceramic Industry Ltd v Hiap Huat Pottery*[1] in which cases related to the point were also discussed. D E

Counsel for the first defendant also argued, obviously as an alternative, for the reduction of the sum of RM28,000 awarded on the contentions that no novel point of law or point requiring specialized knowledge of any particular field was involved, that as the application was for summary judgment, the third defendant needed only to raise a triable issue on applicability of the Singapore banking law and/or the legal validity of the assignment, that, in any event, the third defendant did not present his case because of settlement, that the voluminous documents, unless pertinent, should not be taken into account and that brief fee paid to counsel in Singapore and time spent in consultation should not be considered at all. F

For the third defendant, it was contended that the award made in the proper exercise of discretion ought not to be disturbed, that the claim in the action was substantial (over RM2m) that complex legal points on specialized knowledge of banking law was involved, counsel fee expended was justified, documents were voluminous and that though the application for summary judgment did not proceed to full argument, preparation for the hearing was made. G H

As for review by a judge, O 59 r 36(4) (similar to the English RSC O 62 r 35(4)) provided that save for the qualification therein stated, respecting the reception of further evidence and raising fresh ground of objection, the judge may exercise all such powers and discretion as are vested in the registrar in relation to the subject matter of the application. It has been the practice developed through numerous cases that in matters respecting which the taxing officer has a discretion, the awards should not be interfered with unless he has gone on some wrong principle, or his decision is plainly wrong, or for some other reason similar to those which will induce an I

A appellate court to interfere with the discretion of a judge of the first instance eg that matters which ought to have been but was not taken into account (see further 37 Halsbury's Laws of England (4th Ed) paras 757–850). However, in a recent case of *Jackson v Parker and Gurney Champion*,[2] the English Court of Appeal (per Balcombe J) expressed that the above approach of allowing review on limited circumstances some of which are described B above, no longer represented the modern approach, and that there was no limitation on the court's power to review any decision of a taxing master, whether on quantum, fact or otherwise. In an earlier case of *Thorne v Thorne*,[3] observation was made along this vein when Comyn J, after considering the three cases therein cited, spoke of, at p 665:

C

> a rather clearer principle than they enunciate, and a definite one, that a taxation certificate can be set aside where the court thinks it right and proper in all the circumstances to do so.

Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew[4] cited by counsel for the third defendant is in a different perspective. It was an appeal D from the decision of the High Court to the Supreme Court. Different considerations, eg s 68(1)(c) of the Courts of Judicature Act 1964 applied. Moreover, it seems to deal with the award of costs generally rather than on a specific item as in our instant case.

As to counsel fee in Singapore, the amount at stake in this action was E substantial. It was not disputed that Singapore law was, at least to some extent, involved.

Learned counsel for first defendant has not persuaded me as to why services or advice of counsel in Singapore was unnecessary or why there was no justification for the allowance of such fee on a party and party taxation. The question, in my view, is whether a prudent man would have proceeded F without opinion or advice of counsel. From the nature of the action, the amount of claim involved, the averments and allegations disclosed and raised in the pleadings and the affidavits filed under the application for judgment and that the law of Singapore was involved, I do not think the case can safely be regarded as altogether free from complexity. In my view, G the item (as opposed to quantum) was rightly allowed.

As regards the quantum of counsel's fee, advocate for the first defendant cited *Simpson Motor Sales (London) Ltd v Hendon Corp*[5] that a proper measure for such fee would be such as acceptable to a hypothetical counsel capable of conducting the case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent H reputation. It is, of course, not a sound principle on taxation inter partes to treat the fee paid by the other party as a yardstick. In any given case, it is for the judge using his knowledge and experience to determine what the proper figure is. In the instant case, counsel's fee was about S$8,290 inclusive of outlays. I am not persuaded that the amount is so unreasonably I high as to warrant interference. Indeed the argument in this respect for the first defendant was for total disallowance.

I agree with counsel for the first defendant that in an O 14 application, a defendant need only show the existence of a triable issue. However, since the action had been commenced, I fail to see why a conscientious advocate

for the defence should be precluded from preparing his client's case in greater depth to enhance chances of success in the application, as well as for the action, particularly since pleadings, as in the instant case, had closed. Furthermore, it is, I think, not inappropriate to note that the third defendant had to be involved in the action up to the stage as had actually been attained because of the first defendant's delay in effecting settlement. Had the first defendant settled the claim at the outset, the third defendant would have been spared from the predicament.

There remains the balance of the quantum (ie RM28,000 less Singapore counsel's fee) to consider. For the third defendant, counsel argued that research had to be made in respect of points of law involving specialized knowledge of banking law and voluminous documents were filed. Normally, the extent to which research needs to be made depends largely on the complicity of the issues and the experience of an advocate. In the instant case, however, it is fair to assume that some considerable part of the case on points of law were from counsel in Singapore in respect of which fees had already been included in the item of the bill complained of and had been dealt with in the earlier part of this judgment. In the circumstance, contention of the instructing advocate respecting time and work put into the research of law necessarily loses much of its force. There is also some justification in the complaint that unnecessary or irrelevant materials were filed or exhibited eg opinion of counsel. *Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors*[6] at p 437. Though, generally speaking, the discretion of the taxing officer on quantum will not be interfered with, in view of the above irregularities and after hearing submissions of counsel, a reduction from the amount of RM28,000 for the item is, in my opinion, justified. On the materials available and doing the best I can, I consider a sum of RM18,000 for the item fair and reasonable. The costs as reviewed by the learned registrar on art 152 be reduced to RM18,000 and the allocatur be varied accordingly.

There remains the question of interest. Counsel for the third defendant urged that interest be given for the taxed costs from 11 September 1991 (date of review by the learned registrar). I do not think interest ought to be awarded in this case. Article 152 had all the time been in dispute. The amount thereunder therefore had not been finalized. As regards the balance of the taxed costs, it had not been challenged at all and the third defendant could have demanded or enforced payment thereof.

On the facts and circumstances of this case and since the amount under the art 152 has been reduced but not to the extent of that reviewed by the learned registrar, in the exercise of the discretion of the court I make no order as to costs of this review before me.

In short, the amount under art 152 is reduced from RM28,000 to RM18,000 and there be no costs as to this review.

Order accordingly.

Reported by S Radhakrishnan